Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	

COMMENTS OF BELLSOUTH CORPORATION

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BellSouth Corporation, for itself and its affiliated companies (collectively "BellSouth"), submits the following comments in response to the Notice of Proposed Rulemaking ("*Notice*") released in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

"One of the fundamental goals of the Telecommunications Act of 1996 (the 1996 Act) is to promote innovation and investment by all participants in the telecommunications marketplace, both incumbents and new entrants, in order to stimulate competition for all services, including advanced services."[2] This goal has been achieved for high-volume business users, who can select among several competing providers to fulfill their broadband telecommunications requirements. For low-volume users -- residential consumers, small and rural businesses, schools, libraries and rural health care providers -- the deployment of advanced services is occurring at a slower pace. The goal of this proceeding (and of the related *Notice of Inquiry*

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1 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Dkt. No. 98-147, FCC 98-188 (rel. Aug. 7, 1998) ("*Order*" or "*Notice*," as applicable), *recon. pending*.

2 *Id.* at ¶ 1.

("*NOI*") proceeding)[3] should be to adopt a regulatory framework that will accelerate the deployment of advanced services to these users by removing regulatory constraints that impede investment and dampen competition. Speculation about problems that might arise is not a sufficient basis for regulating the development of the advanced services market, where no firm is dominant and innovation is rampant.

In a market that is characterized by numerous entrants offering advanced services using competing technologies, regulation can only retard the deployment of advanced services. Such deployment requires substantial investment and risk-taking. Technology must be developed; networks must be built or upgraded; service personnel must be trained. Incumbent local exchange carriers ("ILECs"), with their expertise in designing and deploying ubiquitous telecommunications networks and services, are well positioned to make the necessary investments that will enable them to bring advanced services to the broadest segments of the American public, including rural areas. An ILEC's incentive to make those investments will be diminished and the deployment of advanced services will be delayed, however, if unnecessary regulations based on speculative harms limit its ability to respond to competitive market conditions. Only by boldly removing regulatory barriers to *all* potential advanced services providers can the Commission fully encourage the deployment of advanced services to the broadest range of consumers. The Commission must resist the tendency to develop prospective regulatory solutions for abuses that exist only in the crystal balls of ILECs' competitors. The

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[3] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, CC Dkt. 98-146, FCC 98-187 (rel. Aug. 7, 1998) ("*NOI*").

emerging market for advanced services demands resolve in clearing away regulatory obstacles to investment.

At its core, the removal of regulatory barriers to ILEC provision of advanced services requires the Commission to adopt reasonable interpretations of the Communications Act of 1934 (the "Act") that avoid speculative, prescriptive intrusion in the advanced services marketplace. Although the Commission has declined to interpret Section 706 of the 1996 Act as an independent grant of forbearance authority,[4] Section 706 nevertheless informs the Commission that it should interpret the Act in a manner that "remove[s] barriers to infrastructure investment."[5] Moreover, where the Commission retains forbearance authority, Section 706 requires that the Commission exercise that authority to provide ILECs with the freedom to compete fully in the competitive advanced services marketplace. By interpreting the Act in view of the guidance provided by Section 706, the Commission can ensure that the emerging mass market for advanced services is not unduly distorted by artificial impediments imposed to address hypothetical market failures.

Regrettably, the proposals in the *Notice* appear to reflect a preference for heavy, speculative regulation of ILECs that seek to provide advanced services. Rather than formulate a procompetitive, deregulatory approach towards ILEC provision of advanced services, the Commission, without any evidence of market failure in the advanced services market, proposes that ILECs provide such services through "truly" separate affiliates to escape their unique

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4 *See Order* at ¶ 69.

5 Pub. L. No. 104-104, title VIII, § 706(b), Feb. 8, 1996, 110 Stat. 153, reproduced at 47 U.S.C. § 157 note.

regulatory burdens.[6] However, the Commission's proposal to import a strict separate affiliate framework into the advanced services setting is unwarranted and counterproductive. The Commission's experience with separate affiliates clearly shows that structural separation generally is detrimental to investment, innovation, and competition, and results in lost efficiencies, increased costs, and reduced services for consumers.[7] In contrast, when separate affiliates are not required, competition has flourished and new and innovative services have been made available to an increasing number of consumers. Accordingly, in this proceeding, the Commission should eschew structural regulation in favor of a straightforward exercise of its authority to interpret the Act in a manner that facilitates ILEC provision of advanced services on an integrated basis. The Commission should refrain from regulation in the absence of compelling evidence of actual market failure.

Specifically, the Commission should not adopt prescriptive unbundling rules for ILECs' advanced services networks. Nothing in the Act requires the Commission to establish a national standard for advanced services unbundling; to the contrary, by enacting Sections 251 and 252, Congress indicated that negotiation and arbitration should be the preferred method by which competitors would obtain access to network elements. Preserving the Section 251-252

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6 *Notice* at ¶¶ 86, 92.

7 The need for Commission action in this proceeding to avoid these effects are not diminished or undercut by the enactment of structural safeguards in Section 272 for BOC provision of interLATA services. *See* 47 U.S.C. § 272. By its terms, Section 272 is merely a transition mechanism, which will expire three years after a BOC obtains interLATA relief under Section 271. Had Congress intended that structural safeguards apply to advanced services, it would have expressly included such services within the carefully crafted list of services that are subject to Section 272. Indeed, rather than rely on Section 272 as a model for an advanced services affiliate, the Commission should expeditiously grant petitions for Section 271 relief so that the Section 272 transition period can commence, as Congress intended.

process is especially important in the advanced services market, where technology is constantly evolving and where standards have not yet developed. The Commission already has established the minimum national standards for unbundling that will guarantee competitors' access to the local loop and other elements of the underlying circuit-switched network. There is no evidence that state commissions are incapable of or are failing to address these issues in arbitration proceedings. Therefore, there is no reason to conclude that the Commission should attempt to prescribe national standards specifically for unbundling advanced services equipment.

The Commission should also reaffirm that an ILEC is not required to provide its advanced services to competitors at a resale discount if the ILEC predominantly markets its advanced services on a wholesale basis. The Section 251(c) resale obligation is expressly limited to telecommunications services offered at retail. Advanced services offered on a wholesale basis thus are excluded from the Section 251(c) resale requirement. Even where an ILEC markets its advanced service to Internet service providers ("ISPs"), the ILEC is offering a wholesale service to the ISP, which the ISP then includes in its retail offer to its customers. The Commission should clarify that in those circumstances, the ILEC is not required to provide its advanced services at an even greater resale discount to other carriers.

This proceeding is also an appropriate one for the Commission to express its commitment to the aggressive exercise of its forbearance authority under Section 10 of the Act.[8] As Commissioner Powell recently stated, "it is deregulation that yields competition," and the Commission must "lead[] by example" through forbearance.[9] To that end, the Commission

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8 47 U.S.C. § 160(d).

9 Commission Michael K. Powell, Remarks Before PCS '98 (Sept. 23, 1998) ("Powell Remarks").

should declare that it will aggressively grant relief from any dominant carrier pricing or tariffing restrictions or requirements applicable to ILEC provision of advanced services whenever Section 10's conditions are satisfied, and *without* arbitrarily imposing a separate affiliate condition. Regardless of the business structure that the ILEC adopts, the Commission has the authority to forbear from pricing and tariffing requirements, as these requirements do not implicate Sections 251(c) or 271.[10] Formation of an advanced services affiliate should not be a precondition to obtaining pricing flexibility in the competitive advanced services market.

Beyond this proceeding, the Commission should be vigilant in identifying and bold in removing other regulatory barriers to competition in advanced services. In particular, this requires prompt approval of Section 271 applications to permit BOCs to offer advanced services on an interLATA basis, as their competitors are already free to do. LATA boundaries were devised over a decade ago to implement divestiture, and they have no logical application to modern-day data networks.

In the *Notice*, the Commission also requested comment on the level of separation that would be required between an ILEC and its affiliate to ensure that the affiliate is not deemed an ILEC. As mentioned, it is neither necessary nor beneficial from a public interest standpoint to impose structural separation regulation on ILECs. Moreover, any decision regarding the level of separation will likely have implications beyond the advanced services context.

Simply put, the Commission should not proceed down that path. Instead, the Commission should remain focused in this proceeding on identifying steps that it can take to facilitate ILEC deployment of advanced services on an *integrated* basis. For the record,

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[10] *See* 47 U.S.C. § 160(d).

however, BellSouth would point out that the separate affiliate framework proposed in the *Notice* is unduly restrictive and, in BellSouth's view, flatly unworkable for the deployment of mass market advanced services. The proposed separation requirements appear to be based on the separation requirements found in Section 272 of the Act.[11] Section 272, however, concerns the unique circumstances of BOC entry into interLATA services. Rather than import Section 272 into a context for which it was not intended, to the extent the Commission creates a separate affiliate framework as an option for carriers who wish to adopt it, the Commission should follow its recent precedents and apply a version of the *Competitive Carrier* separation framework to advanced services affiliates.[12] The *Competitive Carrier* framework would ensure that affiliates enjoy non-ILEC status while providing ILECs and their affiliates with the flexibility to achieve at least some of the efficiencies of integrated operation. Again, however, BellSouth emphasizes that a separate affiliate option cannot and should not be made a surrogate in this proceeding for the efficiencies of integrated operation that can be achieved only through a reasonable, procompetitive interpretation of the Act.

Finally, the Commission should stay focused on the central purpose of this proceeding -- "to promote the deployment of advanced services in a competitive manner."[13] The Commission should not allow this proceeding to become a rehash of the already-completed local competition proceeding that fully and exhaustively addressed local competition concerns. Except for specific issues that directly relate to the provision of advanced services, the

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11 *Id.* § 272.

12 *See infra* note 60.

13 *Notice* at ¶ 4.

collocation and loop unbundling proposals raised in the *Notice* have no place in this proceeding. Current Commission and state commission local competition rules, and the negotiation and arbitration process of Section 252, already provide competitors with access to network elements for the provision of advanced services, consistent with congressional intent in passing the 1996 Act. The Commission should reject proposals to add to those rules in the absence of evidence that state commissions cannot or will not perform their duty under the 1996 Act.

II. OVERVIEW OF THE ADVANCED SERVICES MARKET

A. COMPETITION IN THE ADVANCED SERVICES MARKET

In its comments to the *NOI*, BellSouth explained that advanced services must include all services -- regardless of technology or transmission media and regardless of preexisting regulation classification-- which offer consumers a high level of bandwidth for efficient, interactive voice and data communications.[14] An expansive definition of advanced services is vital because, as the Commission noted, the concept of what constitutes advanced services will evolve as technology evolves.[15] In particular, the Commission should not entertain any preconceived notions that advanced services are limited to "wireline" services.[16] Advanced services provided via satellites or terrestrial wireless systems (or via non-traditional wireline systems such as cable) may well become the norm as the market continues to develop. Accordingly, the framework adopted in this proceeding regarding ILEC provision of advanced

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14 Comments of BellSouth Corporation to the *NOI* ("BellSouth *NOI* Comments") at 8 (filed Sept. 14, 1998), *correction filed*, Sept. 18, 1998.

15 *Notice* at ¶ 3 n.4.

16 *Id.* at ¶ 3.

services should acknowledge and reflect not only the vast array of existing technologies, but also developing technologies.

As BellSouth explained in its *NOI* comments, a high level of competition permeates the advanced services market.[17] Indeed, competition among advanced services providers catering to high-volume business users has fully developed. Large businesses requiring Internet access and data networking capabilities can obtain high-speed dedicated capacity from a variety of telecommunications providers -- including ILECs, competitive local exchange carriers ("CLECs") and interexchange carriers ("IXCs") -- or from Very Small Aperture Terminal ("VSAT") or other satellite service providers. Although most residential and small business consumers have not yet received the full benefit of advanced services technology (*i.e.,* they continue to rely on the traditional telephone network), increasing consumer demand fueled by the explosive growth of the Internet has attracted advanced services providers from across industry lines. All of these providers of advanced services possess unique strengths and weaknesses, and attempting to apply a rigid regulatory framework to one type of provider can only dampen the competitive dynamic that is currently driving the deployment of advanced services to the mass market.

The effect that this competitive dynamic is having on innovation and investment in the mass market for advanced services can be readily observed. Cable operators are dedicating substantial resources to transform their one-way video delivery systems into interactive high-speed broadband Internet access networks, capable of downstream transmission rates of 10 to 30 Mbps. And to assure that their customers (both subscribers and information providers) get the

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[17] BellSouth *NOI* Comments at 17-36.

full benefit of that capability, cable operators are investing in nationwide Internet backbone and caching facilities. Cable data services have a headstart in the advanced services market and consequently have many more subscribers than digital subscriber line ("DSL") services. With embedded cable plant passing 97.1 percent of U.S. homes, cable providers are strategically positioned to be powerful competitors in the advanced services market.[18]

Satellite service providers also are responding to the growing demand for Internet access by creating new technologies that provide broadband services directly to residential and small business consumers. Hughes Network Systems, a subsidiary of Hughes Electronics, currently offers Internet access to subscribers in the 48 contiguous states at speeds of up to 400 kbps. Last year, the Commission granted licenses to over a dozen Ka-band satellite systems, most of which have proposed to offer global broadband interactive services. In addition, more than 15 applications are pending for satellite systems proposing to use the 36-51.4 GHz band, which may also be used to provide broadband data services. Once deployed, these satellite service networks have the advantage of instant national ubiquity, which results in their ability to enlist additional subscribers at relatively low marginal costs.[19]

Terrestrial wireless and digital broadcast television systems also figure prominently in the advanced services marketplace. Wireless cable operators have recently obtained regulatory authority to offer two-way services, including high-speed Internet service.[20]

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18 *Id.* at 18-22.

19 *See id.* at 26-28.

20 *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, Report and Order, MM Docket 97-217, FCC 98-231 (1998).

Local multipoint distribution service ("LMDS") operators, with over one gigahertz of bandwidth, are also poised to become significant providers of "wireless local loop" services, including broadband access to the Internet. In addition, the flexibility provided to digital television broadcasting stations to use their allotted 6 MHz channels for non-broadcast services promises to create yet another "pipeline" for high-bandwidth connectivity to the home.[21]

These are just some of the industries responding to consumer demand for broadband services. Significantly, each of the competing advanced services providers described above provides service to residential and small business customers by bypassing in whole or in part the conventional "local loop." Indeed, conventional telephone service is a poor substitute for these alternative high-bandwidth networks, as it currently offers consumers no more than 56 kbps of transmission capacity. Not surprisingly, this consumer demand has also caused telecommunications carriers to develop innovative solutions to conventional local loop limitations. The immediate result is the development of DSL technology, which does not now and is not likely ever to dominate the market. In sum, it is time for the Commission to acknowledge that no firm monopolizes or is likely to be able to dominate the last mile in the provision of advanced services.

B. OVERVIEW OF DSL SERVICE

BellSouth's asymmetrical DSL ("ADSL") technology allows, in addition to the traditional circuit-switched voice channel, continuous upstream data channel at up to 256 kbps and a continuous downstream data channel at up to 1.5 Mbps. Thus, voice signals from a

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21 *See* 47 C.F.R. § 73.624(b), (c); *Advanced Television Services and their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809 (1997), *on reconsideration*, 13 FCC Rcd 6860 (1998).

subscriber's phone and data signals from the subscriber's computer travel over the same facility between the subscriber's premises and the central office. At the central office, the voice and data channels are separated by a digital subscriber line access multiplexer ("DSLAM") for transmission onto separate circuit-switched and packet-switched networks.

DSL technology allows local telecommunications carriers to compete in the mass market for advanced services.[22] BellSouth conducted a market trial of ADSL service in Birmingham, Alabama in October 1997, and on September 3, 1998, initiated commercial ADSL service in New Orleans. BellSouth plans to roll-out ADSL service in the following major markets this month:

Birmingham
Atlanta
Charlotte
Raleigh
Jacksonville
Fort Lauderdale

BellSouth expects to follow with service deployment in over twenty additional metropolitan areas in its nine-state region in 1999.[23] BellSouth will face competition not only from cable operators, satellite service providers, and wireless cable providers, but also from CLECs that can purchase unbundled local loops and attach their own DSL equipment.

Given the level of competition in the market, the question is not whether ILECs such as BellSouth will deploy this advanced service, but how quickly. ILECs are prepared to

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22 As BellSouth explained in its *NOI* comments, ADSL is not the only type of advanced services offering that ILECs offer. BellSouth, for example, also offers Integrated Services Digital Network ("ISDN"), fiber, frame relay, and ATM services, all of which provide advanced services capabilities. *See* BellSouth *NOI* Comments at 15-17.

23 BellSouth *NOI* Comments at 13-14.

make the necessary investments to deploy advanced services to all Americans, including those in rural areas. If ILECs must form separate affiliates as a precondition to regulatory relief, then ILECs must divert resources from deployment to form an advanced services affiliate. The result of this diversion will be to delay substantially and to curtail further ILEC deployment of advanced services.

The Commission should not underestimate the substantial costs involved in artificially separating advanced services from the underlying circuit-switched network, as the Commission's proposed separate affiliate framework would require. The greatest costs of separation arise from disentangling advanced services from their integration with the systems and other infrastructure of ILECs' operations. Even new services like DSL service are integrated with the existing operational infrastructure. BellSouth already has begun to adapt its existing operational support systems to handle the ordering, provisioning, maintenance, and billing for DSL services and has long had packet services integrated into its operational infrastructure. Besides the cost of having to undo existing integration of each of these systems, the personnel, hardware, software, and floor space required to operate them would have to be duplicated if the DSL service were artificially separated from the existing network. Indeed, an ILEC also would incur substantial legal and transactional costs simply to establish a separate affiliate. In a region as large as BellSouth's, fully implementing an advanced services affiliate could take twelve to twenty-four months and cost hundreds of millions of dollars.

The wasted costs of a separate affiliate are not counterbalanced by a procompetitive benefit. Whether an ILEC provides DSL service through a separate affiliate or on an integrated basis, the Section 251(c) obligations would still apply to the ILEC's underlying local loop elements that competitors would need to provide a competing DSL service. The cost

of purchasing unbundled network elements will be established by negotiation or through arbitration at the state commission and will not vary based on the type of services that the competitor seeks to provide using the element. Thus, competitors' access to local loop elements for the provision of advanced services will continue to exist regardless of whether the ILEC provides advanced service on an integrated or separate basis, or not at all. And as set forth below, mechanisms short of rigid structural separation have proven reliable to protect against potential cost misallocation and discriminatory treatment.

The time and resources that ILECs would waste by creating a separate advanced services affiliate would be better spent maximizing the deployment of advanced services to residential and small business consumers. Accordingly, as explained more fully below, BellSouth urges the Commission to abandon attempts to impose a separate affiliate framework on the competitive advanced services market and focus instead on adopting a procompetitive policy that does not penalize ILECs for providing advanced services on an integrated basis.

III. THE COMMISSION SHOULD NOT RELY ON A SEPARATE AFFILIATE FRAMEWORK AS A METHOD OF FACILITATING ILEC PROVISION OF ADVANCED SERVICES

Much of the *Notice* is dedicated to a discussion of the separate affiliate framework that the Commission proposes as a means for ILECs that seek to provide advanced services to release themselves from their unique regulatory constraints. Without any evidence or analysis suggesting a need for such a framework, the *Notice* manifests such a bias in favor of that framework that it ignores less regulatory solutions. Indeed, the *Notice* clearly signals that ILECs that do not opt for a separate affiliate can expect their integrated provision of advanced services to be subject to "truly" onerous regulatory burdens.

The separate affiliate framework proposed in the *Notice* is neither legally required nor justifiable as sound public policy given the state and nature of the advanced services market. History has shown that separate affiliates result in increased costs, lost efficiencies, and less innovation, and place ILECs at a competitive disadvantage vis-à-vis their competitors. The Commission need only look to the tortured history of the FCC's efforts to create a separate affiliate framework for BOC provision of enhanced services to understand how detrimental such a framework can be to the deployment of competitive new services to consumers. Rather than introduce this failed model into the competitive advanced services market, the Commission should explore alternative methods through which it can use its authority to interpret the Act and its forbearance authority to facilitate ILEC provision of advanced services on an integrated basis. Separate affiliates are no substitute for market forces when the market -- as here -- is competitive, and they are not preferable to less burdensome regulatory approaches where markets are not fully competitive.

A. THE COMMISSION'S *COMPUTER II* AND *III* PROCEEDINGS ESTABLISH THE IMPORTANCE OF ENABLING THE PROVISION OF COMPETITIVE SERVICES ON AN INTEGRATED BASIS

The Commission's *Computer II*[24] and *III*[25] proceedings provide the paradigmatic example of how an inflexible regulatory framework, though well-intentioned, can discourage the

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24 *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 FCC 2d 384 (1980) ("*Computer II Order*"), *recon.*, 84 FCC 2d 50 (1980) ("*Computer II Recon. Order*"), *further recon.*, 88 FCC 2d 512 (1981), *affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

25 *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III)*, Report and Order, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) ("*Computer III Order*"), *recon.*, 2 FCC Rcd 3035 (1987) ("*Phase I Recon. Order*"), *further recon.*, 3

development of innovative services. In *Computer II*, the Commission established a rigid framework that required AT&T (and after divestiture, the BOCs) to provide enhanced services through a separate affiliate. This framework, as the Commission learned, "hinder[ed] the introduction of enhanced services that could benefit the public by being widely and efficiently available through the BOCs' local exchanges."[26] Accordingly, the Commission properly eliminated the separate affiliate requirement for AT&T and the BOCs in favor of a regulatory framework that facilitated integrated service offerings. The results are apparent: consumers now have greater access to an increasing variety of innovative enhanced services.

1. The *Computer II* Proceeding

In the *Computer II* proceeding, the Commission attempted to address new issues "raised by the confluence of communications and data processing."[27] That "confluence" enabled a carrier to provide both "plain old telephone service" ("POTS") and enhanced services using the same underlying phone network. The *Computer II* proceeding was initiated to develop a framework that would permit regulated carriers to provide enhanced services while deterring

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FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989), *Computer III Order and Phase I Recon. Order, vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*"); Phase II, 2 FCC Rcd 3072 (1987) ("*Phase II Order*"), *recon.*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989), *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); *Computer III Remand Proceedings:Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) ("*BOC Safeguards Order*"), *recon. dismissed in part*, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1427 (1995) (collectively, "the *Computer III* proceeding").

26 *Computer III Order*, 104 FCC 2d at 1007, ¶ 89.

27 *Computer II Order*, 77 FCC 2d at 386, ¶ 2.

such carriers from misallocating the costs of the competitive enhanced service to its captive ratepayers or from discriminating against its enhanced services competitors that relied on access to the underlying network services.

In the *Computer II Order*, the Commission attempted to address its cost allocation and discrimination concerns by requiring AT&T (and later the BOCs) to provide enhanced services through a separate affiliate. At the time, the Commission thought that a separate affiliate would "preserve as many of the putative advantages of integration as possible and [would] limit the disadvantages."[28]

Accordingly, the Commission imposed a rigid separate affiliate requirement on the provision of enhanced services by AT&T and the BOCs. The Commission required that the separate affiliate maintain its own books of account.[29] An enhanced services affiliate was also required to "have its own operating, marketing, installation and maintenance personnel for the services and equipment it offers"[30] and was prohibited "from using in common any leased or owned physical space or property" on which facilities used for basic telecommunications services were located.[31] In addition, the Commission also required AT&T and the BOCs to obtain approval of capitalization plans for their enhanced services affiliates.[32] In adopting these

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28 *Id.* at 461, ¶ 202.

29 *Computer II Order*, 77 FCC 2d at 476, ¶ 236.

30 *Id.* at 477, ¶ 239.

31 *Id.* at 477, ¶ 240.

32 *Id.* at 485, ¶ 258.

and other separation requirements, the Commission believed that it had adopted only the "minimum necessary" to address its regulatory concerns.[33]

2. The *Computer III* Proceeding

In the *Computer III* proceeding, the Commission concluded that it had not, in fact, imposed the "minimum necessary" to address its regulatory concerns. Rather, the Commission learned that the separate affiliate requirement substantially increased the costs of providing enhanced services, diminished inherent efficiencies, and ultimately discouraged innovation and deployment of enhanced service capabilities. Specifically, the Commission found that by deterring the BOC provision of enhanced services, the Commission's rules had the unintended effect of diminishing innovation and competitive investment throughout the industry. Regarding costs, the Commission observed that separation required the wasteful duplication of facilities, personnel and resources. Separation also resulted in substantial inefficiencies, as "BOCs [were] unable to organize their operations in the manner best suited to the markets and the customers they serve" and were unable to offer "system solutions" to their customers' service needs.[34]

Moreover, the Commission recognized that its separate affiliate framework had effectively denied consumers the benefits of innovative new services.[35] The Commission pointed to the proposed Custom Calling II VMS service, a voice mail type service, as an example of a service that had been "completely foreclosed to the public" because of the *Computer II* separate affiliate rules.[36] Pre-divestiture AT&T had requested a waiver of the *Computer II*

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33 *Id.* at 476, ¶ 235.

34 *Computer III Order*, 104 FCC 2d at 1008, ¶ 91.

35 *Id.* at 1007, ¶ 89.

36 *Id.* at 1008, ¶ 90.

separate affiliate requirement to allow the BOCs to provide Custom Calling II on an integrated basis.[37] The Commission denied the waiver, finding, among other things, that AT&T could provide Custom Calling II through a separate subsidiary "economically" and that AT&T had not shown that "others will not be able to provide the service ubiquitously."[38] In fact, as of the date of the *Computer III Order*, "no such network-based services ha[d] been offered."[39] The Commission particularly noted that, while services similar to Custom Calling II were on the market, "the *Computer II* regulatory regime . . . prevented consumers, *and particularly small-business and residential consumers*, from having yet another choice . . . in the VMS marketplace."[40]

As a result of the Commission's experience with Custom Calling II and the *Computer II* framework in general, the Commission concluded that "there is at least a substantial likelihood that [the Commission's] regulations in this area have been part of the problem, not part of the solution."[41] Accordingly, the Commission eliminated the separate affiliate requirement for the provision of enhanced services by AT&T and the BOCs and replaced them with a more reasonable framework of non-structural safeguards. These non-structural safeguards included the development of Comparably Efficient Interconnection and Open Network

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37 *See American Telephone & Telegraph Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations*, Memorandum Opinion and Order, 88 FCC 2d 1 (1981).

38 *Id.* at 26-27, ¶¶ 85, 87.

39 *Computer III Order*, 104 FCC 2d at 1008, ¶ 90.

40 *Id.* (emphasis added).

41 *Id.* at 1003, ¶ 79.

Architecture to ensure that competitors were afforded an equal opportunity to compete, and cost allocation rules to protect ratepayers against cost misallocation.

The effect of eliminating *Computer II*'s separate affiliate requirement on the deployment of enhanced services has been unmistakable. As early as 1991, the Commission observed that "BOCs have provided voice mail service, E-Mail, gateways, electronic data interchange, data processing, voice store-and-forward, and fax store-and-forward services."[42] The Commission was particularly impressed with the deployment of voice mail services, noting that "[i]n the relatively brief time that the BOCs have been permitted to provide that service, voice mail has been provided to rapidly increasing numbers of customers in their regions at reasonable prices."[43] Moreover, as the Commission noted in 1995, structural separation proved to be unnecessary to prevent discriminatory treatment by the BOCs against their competitors.[44] In short, replacing structural separation with a framework that permitted the BOCs to offer enhanced services on an integrated basis achieved the results that the Commission is seeking to achieve here: the deployment of innovative new services on an efficient and timely basis and the development of a robustly competitive market.

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42 *BOC Safeguards Order*, 6 FCC Rcd at 7575, at ¶ 7.

43 *Id.* Indeed, voice-mail services are now available to approximately 90% of BellSouth customers from multiple service providers.

44 *See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, Notice of Proposed Rulemaking, 10 FCC Rcd 8360, 8379, ¶ 29 (1995).

B. THE COMMISSION SHOULD ADOPT A FRAMEWORK THAT WILL ENCOUARGE ILEC PROVISION OF ADVANCED SERVICES ON AN INTEGRATED BASIS

Given the proven success of using a non-structural safeguards framework in promoting the deployment of enhanced services, the Commission should adopt a framework in this proceeding that will similarly encourage ILEC provision of advanced services on an integrated basis. As in the enhanced services context, integrated operation will allow ILECs to enjoy economies of scope and realize efficiencies of operation, which will lead to broader deployment and lower cost for consumers. Moreover, non-structural safeguards here can effectively assure that competitors have access to the facilities and capabilities they require to provide advanced services. Indeed, these safeguards are already in place. For example, existing rules granting competitors nondiscriminatory access to unbundled network elements of the circuit-switched network ensure that competitive advanced services providers will have sufficient capabilities to provide a competing service to consumers. Price caps and resale requirements, not to mention competition in capital markets, effectively eliminate any incentives for anticompetitive cost misallocation.

Moreover, facilitating ILEC provision of advanced services on an integrated basis will promote competition by reducing regulatory distinctions among competing providers. ILECs face competition in the advanced services market from cable operators, satellite service providers, and other telcos. These competitors may freely structure their businesses in any manner that they believe best responds to market conditions. An asymmetrical regulatory policy that fails to provide ILECs with similar flexibility would only distort this competitive market by raising ILECs' costs and diminishing their ability to respond to consumer demand.

The Commission should not entertain the mistaken notion that Section 272 of the Act[45] in any way diminishes the detrimental effect that a separate affiliate framework could have on the deployment of advanced services. Congress enacted Section 272 as the transition mechanism through which BOCs would be able to enter the interLATA market, from which they had been previously excluded. To that end, Congress imposed exceedingly stringent separation requirements, but limited Section 272's application to BOC affiliates providing interLATA services and, even in that instance, limited the application of Section 272 to three years from the date of grant of Section 271 relief.[46]

Advanced services such as DSL service, however, are distinctly different in kind and regulatory consequence. They function as access services connecting consumers to information located on the Internet or on other data networks via ISP platforms. As Congress did not include access services within the scope of Section 272, the Commission should not now circumvent Congress' framework by relying on a Section 272-type framework in this proceeding. To the contrary, the Commission should fulfill Congress' intentions by expeditiously granting Section 271 relief so that BOCs can provide interLATA data services on par with its competitors and thereby be given the ability to compete fully in the entire advanced services market.[47]

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45 47 U.S.C. § 272.

46 *Id.* § 272(A)(2), (f)(1).

47 *See* Section V *infra.*